LIBRARY
SUPREME COURT U.S.

Office - Supreme Court, U.
FILED
SEP 1 1955
HAROLD B. WILLEY, Cle

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 27

National Labor Relations Board, Petitioner

vs.

The Warren Company, Incorporated

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT, THE WARREN COMPANY, INCORPORATED.

JOHN WESLEY WEEKES
Counsel for Respondent
Box 250, Decatur, Georgia

INDEX

		page
I.	The statute involved	1
II.	Statement of the case	3
III.	Argument	5
	(a) Distinction between enforcement and contempt proceedings	6
	(b) Brooks case not applicable	7
	(c) Respondent follow law and precedent	7
	(d) Great Southern case overruled by statute and decision	11

CITATIONS

National Labor Relations Act, as Amended, 61 Stat. 136, 29 U.S.C. 151 *et seq.*

Brooks vs. N. L. R. B., 348 U.S. 96.

N. L. R. B. vs. Mexia Textile Mills, 339 U.S. 563.

N. L. R. B. vs. Aldora Mills, 197 Fed (2) 266.

Frank Bros. Co. vs. N. L. R. B., 321 U.S. 702.

Joe Hearin, 66 N.L.R.B. 1276.

Squirrel Brand Co., 104 N.L.R.B. 289.

N. L. R. B. vs. Poultry Enterprises, Inc., 207 Fed (2d) 522.

Mid-Continent Petroleum, 204 Fed (2) 613, 346 U.S. 856.

N. L. R. B. vs. Mayer, 196 Fed (2) 927.

N. L. R. B. vs. Inter City Adv. Co., Inc., 154 Fed (2) 244.

N. L. R. B. vs. Appalachian Electric Power Co., 140 Fed (2) 217.

N. L. R. B. vs. Century Oxford Mfg. Co., 140 Fed (2) 541.

N. L. R. B. vs. Bradley Washfountain Co., 192 Fed (2) 144.

Great Southern Trucking Co. vs. N. L. R. B., 139 Fed (2) 984, 322 U.S. 729.

Vulcan Forging Co., 188 Fed (2) 927.

13 C. J., 16.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 27

National Labor Relations Board, Petitioner

vs.

The Warren Company, Incorporated

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT, THE WARREN COMPANY, INCORPORATED

I

THE STATUTE INVOLVED

The provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, et seq) which are printed in the Petitioner's brief (Appendix pp 31-33) are relevant. Other relevant provisions of this Statute are printed below:

"Section 1. (b) . . . It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, *to protect the rights of individual employees in the relations with labor organizations . . .*"

"Section 101: . . . It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining, and *by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing*, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

"Section 7: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and *shall also have the right to refrain from any or all of such activities.*"

"Section 8 (a): It shall be an unfair labor practice for an employer—

(1) *to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.*"

"Section 9 (a). Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

(c). (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9 (a), or (ii) *assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Sec. 9 (a);* or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall ~~not~~ make any recommendations with respect thereto. *If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof . . .*

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve month period, a valid election shall have been held . . ."

II

STATEMENT OF THE CASE

There has never been at any time a Board conducted election for certification or decertification of the Union

at Respondent's plant: On petition to adjudicate the Company in civil contempt for refusing to comply with the decree, the Company asserted that it had in all good faith complied with all of the provisions of the decree in that it had posted notices, had reinstated certain employees, had paid back wages to those certain employees, had ceased and desisted from the practices prohibited by the decree, and had sought, in all good faith, through all legal processes the determination of the majority status of the Union. These requests for a fair determination of this status through the facilities of a Board-conducted and supervised election were flatly denied by the Board. *After the enforcement decree* the Company had received a voluntary written notice from five (5) of its six (6) employees in the unit that they did not belong to the Union and did not want it as their representative.

On November 23, 1948 the Union filed with the Board a Petition for Certification as the Bargaining Representative of Respondent's employees. An agreement for a consent election was entered into between the Respondent and the Union on January 5, 1949. On January 8, 1949 the Union withdrew its consent and *the election was never held.* Subsequently, unfair practice charges were filed by the Union, and, after a hearing thereon the Board ordered the Company to recognize the Union as the Bargaining Agent *on the basis of card designations.* Respondent was adjudged by the Board as guilty of certain unfair practices, including discriminatory discharges and failure to bargain, and the Court entered its Enforcement Order, citing as authority the case of *NLRB vs. Mexia Textile Mills* (339 U.S. 563), wherein an enforcement order was declared to be proper even though there had been

compliance. Respondent had complied with the Court's decree by the posting of notices, the reinstatement of certain designated employees, the payment to them of back wages, had met for bargaining as described in the Petition to this Court, had furnished wage information (R 36); and had offered to bargain, but requested proof of the Union's majority. A petition signed by five out of six employees involved informed Respondent that it was the desire of these employees that the Union no longer be recognized as their bargaining agent (R 72 Exh A). Respondent petitioned the Board to hold an election to determine the status (R 69). The Board refused. (R 70). New circumstances in the submission by the employees of a written repudiation of the Union, and a refusal of the Board's processes, as above related, had arisen since the enforcement decree. The Board petitioned the Fifth Circuit Court of Appeals to find Respondent in Contempt, principally on the ground that it had failed to bargain. (R 7). The Court absolved Respondent and dismissed the Petition. (R 77).

III

ARGUMENT

Never, at any time, has there been a Board conducted election to determine if the Union represented any or a majority of the employees in Respondent's plant. This is true although the Board repeatedly has been requested and petitioned to hold an election. Without this assistance to determine fairly the agency, the Respondent had no recourse other than to accept the voluntary written statement of its employees to the effect that they did not want to be represented by a Union. If an agency ever existed it was revoked. To have bargained further with a Union *not* the representa-

tive of the employees would have been violative of the letter and spirit of the Act. This Court in *Brooks vs. NLRB*, 348 U. S. 96 has held that it was the "responsibility of the employer to petition the Board" for a fair determination of the question. This responsibility was met by Respondent but the Board arbitrarily refused to lend its assistance.

(a) Distinction Between Enforcement and Contempt Proceedings.

There is a marked distinction between the relief sought and afforded in an enforcement case before the Circuit Courts and the relief sought and afforded in a contempt case. The lower Court was correct in saying "entirely different considerations apply." This Court in the ruling in *NLRB vs. Mexia Textile Mills* 339 U. S. 563 and other cases has held that the Board is entitled to an enforcement decree regardless of the fact that its own order has been complied with in every respect. And if the Board issued its order on findings based on substantial evidence, these findings could not be disturbed by the Court. In contempt proceedings the Court may look to the acts and attitude of the Respondent with respect to its own decree. In the instant case new circumstances had arisen since the issuance of the enforcement order. Respondent had been confronted with a voluntary written direction from its employees not to deal with the Union as their reprsentative. Following receipt of this notice Respondent sought the processes of the Board for a fair and orderly determination of the question of agency (R 69). These processes were arbitrarily denied Respondent. (R 72 Ex. B; R 70.) The lower Court in its opinion granting the enforcement decree specifically held that it was required to grant the decree regardless of compliance, and that

loss of a majority could not be urged as a defense in an enforcement proceeding. (R 2). The implication could be drawn that it could be urged later, and the Court's own precedent in the case of *NLRB vs. Aldora Mills* 197 Fed. (2d) 266 would support this implication.

"Board's order does not fix a permanent bargaining relationship without regard to new situations that may develop." *Franks Bros. Co. vs. NLRB* 321 U. S. 702.

(b) Brooks case not applicable.

In the recent case of *Brooks vs. NLRB*, 348 U. S. 96, this Court upholding the Board's twelve month formula said: "A certification, *if based on a Board conducted election*, must be honored for a reasonable period, ordinarily 'one year' *in the absence of unusual circumstances.*" And in the footnote in this case the Court says "Both before and after the Taft-Hartley Act, the Board and the Courts did not apply the rule to a collective bargaining relationship established *other than as the result of a certification election*, citing Joe Hearin, 66 NLRB, 1276 (card check); NLRB vs. Mayer, 196 Fed. (2d) 286 (card check); Squirrel Brand Co., 104 NLRB 289, (order to bargain)." In the Mayer case, cited by this Court, the Board refused an election, certified the Union on the basis of a card check, and ordered bargaining. The Court denied enforcement.

(c) Respondent followed law and precedent.

In the instant case there is no unfair labor practice to which the employee defection can be attributed. Immediately after the enforcement decree the Respondent offered to bargain, but it was immediately confronted with voluntary written repudiation of the Union by the employees. Nowhere is it claimed in the contempt petition that the repudiation was instigated

by the Respondent, and nowhere is it controverted that the repudiation was an entirely voluntary act on the part of the employees expressing their free choice.

From the earliest decisions under the Wagner Act to the latest decisions under the Labor Management Relations Act, the Courts have zealously guarded the rights of the employees and have sought to have their wishes determined fairly. They have endeavored not to force upon the employees a bargaining agent not of their choosing. They have expressly stated that *for an employer to deal with a Union not the choice of the employees would be an unfair practice.*

NLRB vs. Poultry Enterprises, Inc.
207 Fed. (2d) 522

Mid-Continent Petroleum
204 Fed (2) 613
Cert. denied 346 U. S. 856

NLRB vs. Mayer
196 Fed. (2) 286

NLRB vs. Vulcan Forging Co.
188 Fed. (2) 927

NLRB vs. Aldora Mills
197 Fed. (2) 266

"Whenever the will of the employees to revoke the power of their bargaining agent is clear and unquestioned, effect must be given under the Act to such revocation." This principle is upheld in all of the above cases.

Respondent contended that it had complied with every portion of the Court's decree, even before its entry, but that it had not bargained to a conclusion a

contract with the Union. Respondent repeatedly called to the attention of the Union, the Board, and the Court, in the enforcements proceedings, the Union's lack of a majority. After the decree Respondent was requested in writing by five out of the six employees involved not to recognize the Union. Respondent petitioned the Board to clarify the situation and call an election to determine the status of the bargaining agent. The Board refused to call an election, stating it was the policy of the Board to recognize the Agent, regardless of circumstances, for a period of one year after certification. There is no authority in the statute for such policy under such circumstances.

The situation in this case is identical with that in *NLRB vs. Aldora Mills*, 197 Fed. (2d) 266, on contempt, before the 5th Circuit Court. There the employees petitioned for decertification and the Board refused to process the petition because the year had not elapsed from the date of certification. Just as this Respondent did, they refused to bargain. The Court dismissed the Contempt Proceedings. The Court held:

> "Our examination of the record made in this proceeding . . . and of the controlling decisions, leaves us in no doubt that the Respondent in declining to continue bargaining with the Union as ordered by our decree, acted in the utmost good faith and in the sound belief engendered by the decertification petitions and the notices and information it had received from its employees that it was proper under the Act and our decree for it to do so."

See also:

NLRB vs. Inter City Advertising Co., Inc.
154 Fed. (2) 244;

The same ruling was made in *Mid-Continent Petroleum Corporation vs. NLRB*, 204 Fed. (2) 613, certiorari denied by the Supreme Court, 346 U. S. 856. There the Court held there was no statutory authority for holding the certification valid for one year regardless of the wishes of the employees to revoke the bargaining agency.

NLRB vs. Appalachian Electric Power Co.
140 Fed. (2) 217;

NLRB vs. Century Oxford Mfg. Corp.
140 Fed. (2) 541.

In *NLRB vs. Mayer*, 196 Fed. (2) 286, the Court held:

> "If we should compel Respondent to bargain further with this Union, which the employees themselves have obviously repudiated, the result would be to deny them the right secured by the Act to bargain thru the representative of their choice. The choice has been made by the employees in a manner which does not admit of dispute. We see no reason why the employer cannot accede to the wishes of his employees and discontinue dealing with it."

In *NLRB vs. Bradley Washfountain Co*, 192 Fed. (2) 144, it was held that "the company was guilty of no unfair labor practice in refusing to bargain with the Union after it had learned that a majority of its members had voluntarily disclaimed a desire to be connected with it any longer, and that it would rob the National Labor Relations Act of all realities and practicalities to continue to recognize such Union as the bargaining agency."

An agency, not coupled with an interest, can be revoked at any time by the principal.

The law was well settled at the time.

(d) Great Southern case overruled by statute and decision.

The Board lays great emphasis on the decision of *Great Southern Trucking Co. vs. NLRB* 139 Fed. (2d) 984, certiorari denied, 322 U. S. 729. This case based on the 1935 Statute was decided Jan. 10, 1944, and certiorari denied by this Court on April 24, 1944, three years before the passage of the "Labor Management Relations Act of 1947" whose declared policy in Sections 1b and 7 was to protect the wishes of the employees and to provide for "the right of (the employee) to refrain from any or all of such activities (union membership)." These sections were not incorporated in the 1935 Statute under which the Great Southern Trucking Co. case was decided. Neither were those provisions incorporated in the 1935 Act which are found in the 1947 Statute in Sec. 9 (c) (i) Aii, providing for the decertification of the Union, and requiring the Board to hold an election if it has cause to believe a representation question affecting commerce had arisen. In the instant case how could the Board have believed otherwise? The Commerce feature was present. The petition by the employees had been filed.

The Great Southern Trucking Co. case was under an older statute wherein the right of the free expression of the employees was not so closely guarded.

Under the new statute this Court in denying certiorari in the case of *Mid-Continent Petroleum Corporation vs. NLRB*, 204 Fed. (2d) 613, (cert. denied 346 U. S. 856), overruled the holding in the Great

Southern Trucking Co. case, and the Fifth Circuit followed the established law in refusing to find this Respondent in contempt. Respondent had followed the law. It had not violated Sec. 8 (a) 1 of the new Act for it did not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7," one of which rights was "to refrain from any or all of such activities," the activities being self-organization and to form, join, or assist labor organizations, to bargain collectively through *representatives of their own choosing.*" Had Respondent followed a different course of conduct it would have violated the Act. Not only was the course of conduct approved by this Court in denying certiorari in the Mid-Continent case, but the same ruling had been followed by the Circuit Courts in *NLRB vs. Mayer* 196 Fed. (2d) 286, *NLRB vs. Vulcan Forging Co.* 188 Fed. (2d) 927, *NLRB vs. Aldora Mills* 197 Fed (2d) 266..

Could the Respondent be held in contempt when it had followed a course of conduct which had been approved by the Courts, and particularly its own Circuit? Could it be in contempt for following the law as it was then written and as it was then interpreted? This was before the decision in *Brooks vs. NLRB*, 348 U. S. 96 ,but it is insisted that the Brooks case is not controlling even now, since there had been an election in the Brooks case and not one in the instant case.

Did the lower Court abuse its discretion in refusing to find Respondent in contempt when it followed the law as it had then been interpreted?

Contempt is a harsh remedy. It implies that the Respondent totally disregarded the Court's decree. Here Respondent had complied with every portion of the

decree with the possible exception of bargaining. In that instance it had offered to bargain and had bargained to a limited extent, and had sought to comply with the law as written and as then interpreted. The judgment of the trial court recites all the facts constituting the alleged contempt. "Change of conditions subsequent to the making of a court order may constitute sufficient justification for disregarding such order." 13 C. J. 16.

Respondent did not offend the lower Court, and it so stated. Unless the lower Court abused its discretion, its judgment cannot be disturbed.

The opinion of the lower Court is the ablest argument that can be presented in support of the dismissal of the contempt petition.

IV

CONCLUSION

It is respectfully submitted that the Fifth Circuit did not abuse its discretion and that its decree should be affirmed.

JOHN WESLEY WEEKES
Counsel for Respondent
The Warren Company, Incorporated

P. O. Box 250
Decatur, Georgia